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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT JUNEAU**

MYRNA I. JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	
)	
FRED MEYER STORES, INC., and)	
JAIME SAN MIGUEL,)	
)	
Defendants.)	Case No. J-04-008 CV (RRB)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' OMNIBUS MOTIONS IN LIMINE

Defendants move *in limine* to exclude testimony of the following witnesses: Paz Carrillo, Sarah Dexter, Mary Droddy, Jay Epstein, Charina Fontenot, Johnna Havard, Matthew Laney, Sallie Tenwolde and Maranda Wilburn. Plaintiff seeks to establish that Jaime San Miguel, her immediate supervisor, orchestrated a concerted campaign over a six-day period to remove Plaintiff from her position in violation of state and federal laws and in breach of the terms of her "for cause" employment relationship with Defendant Fred Meyer. Accordingly, Plaintiff Myrna Johnson hereby opposes Defendants' blanket motion to exclude testimony of potential witnesses for Plaintiff.

I. THE FACTS MANDATE DENIAL OF DEFENDANT'S MOTION *IN LIMINE*.

In 1992, Fred Meyer and Myrna Johnson entered into a for-cause employment contract. Fred Meyer promised to provide Ms. Johnson with a career, offering her job security and increasing pay raises and promotions if Ms. Johnson performed her job well and met all enumerated, objective requirements for advancement within the Fred Meyer organization.

1 Throughout her employment, to induce her to devote the large quantities of time required to
2 become a manager, Fred Meyer made numerous representations to her, both orally and in
3 writing, that she would be treated fairly and consistently with its documented internal
4 disciplinary processes.

5 Based on those promises, for almost a decade, Ms. Johnson committed herself fully to
6 her job at Fred Meyer. She progressed from an hourly, part-time employee to full-time,
7 salaried management position working an average of 55 and up to 70 hours a week. In March
8 of 2002, over a period of just six days, her career was terminated by the actions of defendant
9 Jaime San Miguel, her immediate supervisor, with the knowledge and consent of Fred Meyer
10 upper-level management. Defendants wanted to replace Ms. Johnson for improper reasons –
11 her age and because she was the mother of a troubled child – but needed to violate the terms of
12 her for-cause employment relationship with them to do so.

13 In order to remove Ms. Johnson from her management position Mr. San Miguel needed
14 to have her either terminated or demoted. Among the voluminous policies and rules by which
15 Plaintiff and all employees performance ought to have been judged are “recovery” standards
16 (the appearance of clothing products on shelves and tables) and “planograms” (clear-cut charts
17 or illustrations of desirable appearances of retail areas), both of which are unarguably objective
18 standards meant to maximize consistency in retail operations. Mr. San Miguel used his
19 position as supervisor of other employees to browbeat and demoralize Plaintiff, and failed to
20 follow the clear, objective standards and terms to which Plaintiff, and all Fred Meyer
21 employees, were trained and expected to adhere. He waged a campaign of unceasing daily oral
22 and written subjective criticisms and harassment which culminated in an emotional
23 confrontation with Ms. Johnson trapped in a small, confined space with Mr. San Miguel and
24 Fred Sayre, both large men.

25 Ms. Johnson began sobbing uncontrollably as Mr. San Miguel ordered her to sign a
26 Written “Employee Warning Notice”, an advanced form of discipline which threatened her
27 with removal from the managerial position to which she was entitled according to the terms of
28 her employment. The Written Employee Warning Notice is a form of discipline which
normally occurs only after other progressive disciplinary steps have been taken, after the

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1 passage of significantly more time than a week. As none of the disciplinary actions pursuant to
2 Fred Meyer policies precedent to the Written Employee Warning Notice had occurred, and
3 given that Ms. Johnson had worked unceasingly and uninterruptedly, though unsuccessfully,
4 for the prior six days to respond to San Miguel's escalating complaints, she very reasonably
5 feared that he was going to have her fired or demoted.

6 Overwhelmed with the impending potential loss of her career and the series of events
7 that had occurred over less than a week's time which had allowed Mr. San Miguel to
8 accomplish his nefarious objective despite Fred Meyer policies, Ms. Johnson began sobbing
9 uncontrollably. Distraught, embarrassed, and humiliated, she told the men she had to leave the
10 room and did so in an effort to collect herself emotionally. She did not hear Mr. Sayre threaten
11 that if she left the room that it would be considered a voluntary "walk off" from the job.

12 While Ms. Johnson went downstairs to continue crying in the Apparel stock room, Mr.
13 Mr. San Miguel and Mr. Sayre took advantage of her absence and called the Portland
14 headquarters for Fred Meyer. They then took an action not allowed for by Fred Meyer policies,
15 and the decision was made to describe Ms. Johnson's tearful exodus from the room as a "walk-
16 off" from the job and thus, a "voluntary termination." The following day Ms. Johnson was
17 surprised to discover that she had been terminated in clear violation of the for-cause
18 employment relationship between herself and Fred Meyer.

19 Ms. Johnson intends to call all of the witnesses who have previously provided affidavits
20 in this matter to testify live at trial. In general, the witnesses are expected to testify as to their
21 personal knowledge in the following non-exclusive areas:

- 22 • Representations made to them in the hiring and employment process by Fred Meyer as
23 to the nature of the employment contract;
- 24 • Representations made to them in the hiring and employment process by Fred Meyer as
25 to the nature of the company's use of progressive discipline;
- 26 • Their training and experience in regards to the progressive discipline process used by
27 Fred Meyer;
- 28 • Their training and experience in working with Ms. Johnson in the Apparel Department;

- Their training and experience in working closing shift, recovery and assembling planograms;
- Their observations of Ms. Johnson the week prior to her termination – her work efforts, concentration, attitude, diligence and quality of work performed based upon their training and experience;
- Their observations of Mr. San Miguel and his actions which support the conclusion that he was motivated to terminate or demote Ms. Johnson for reasons other than her job performance.

These witnesses' testimony is relevant and admissible.

II. DEFENDANTS' MOTION *IN LIMINE* FAILS TO MEET THEIR OWN STATED STANDARD.

Defendants cite Fenimore v. Drake Const.Co.¹ as controlling authority for the appropriateness of granting a motion *in limine*. Plaintiff notes that this is a State of Washington case and is not controlling in U.S. District Court for the District of Alaska, but concedes for the purposes of this motion that even if this is the standard, Defendants fail to meet it. Firstly, Defendants have failed to describe the evidence they seek to have excluded with adequate specificity. Defendants appear to anticipate that, "testimony regarding ... job performance," and, "testimony regarding ... work performance and character," will be elicited at trial. However, Plaintiff seeks to call the witnesses in question for their knowledge of Fred Meyer employment policies and practices. In so far as the witnesses in question may testify as to the topics enumerated by Defendants in their Motion *in limine*, Defendants still must show such evidence to be inadmissible or likelier to prejudice or confuse than prove a valid point. Plaintiff asserts that the performance did not merit disciplinary action, let alone termination, and therefore the witnesses in question may offer valid testimony as to the quality of her work. There is little reason to suspect this might confuse or prejudice a jury, certainly when weighed against its probative impact.

¹ 87 Wn.2d 85, 91, 549 P.2d 483 (1976).

III. PLAINTIFF AND CO-WORKER ARE COMPETENT WITNESSES WHOSE TESTIMONY REGARDING PLAINTIFF'S WORK PERFORMANCE IS ADMISSIBLE BECAUSE IT IS RELEVANT, AND IS NOT IMPROPER CHARACTER EVIDENCE.

Defendants move the court *in limine* to prohibit nine (9) of her Fred Meyer co-workers from testifying about Plaintiff's work performance. (While Defendants' Motion does not specifically state the goal of excluding Plaintiff's testimony, the heading to Section A states that, "PLAINTIFF AND CO-WORKER TESTIMONY ... SHOULD BE EXCLUDED" and thus this Opposition refutes this larger assertion.)

Firstly, Defendants argue that Plaintiffs and her co-workers are not competent to testify about Plaintiff's work performance. Each of the co-workers Plaintiff seeks to call to testify is competent unless otherwise provided by evidentiary rules, given personal knowledge of the matter.² Plaintiff herself and each of the co-workers have firsthand knowledge of Fred Meyer employment policies and practices, and may further have knowledge of the extent to which these policies and practices were followed in Ms. Johnson's case. A lay witness's opinion is admissible if the testimony is rationally based on the witness's own perceptions and would be helpful to the determination of the facts at issue.³ Plaintiff and her co-workers' opinions are rationally based on their own perception of Fred Meyer standards and criteria for recoveries and planograms, and of Plaintiff's job performance based on their experience and training. This testimony is helpful to explain to the jury that the Plaintiff's discharge from Fred Meyer had nothing to do with her work performance on recoveries and planograms, and further that it was in violation of the for-cause employment relationship.

Plaintiff and her witnesses will testify that plaintiff's job performance in performing "recovery" and building a "planogram" were consistent with their training, experience and Fred Meyer's own written policies and procedures. While defense counsel may inquire as to the

² Fed R. Ev. 601 & 602.

³ Fed. R. Ev. 701.

1 basis for those opinions, they are certainly relevant. In essence, plaintiff's witnesses are talking
2 about their training, experience and observations. Since Mr. San Miguel apparently claims that
3 the recoveries were done improperly, it is proper to introduce testimony that they were not. He
4 cannot be the sole judge of Ms. Johnson's work performance. Fred Meyer is a standards based
5 business with explicit and detailed descriptions of how work is to be performed. In no place is
6 it stated that one's job performance depend on nothing more than satisfying the whims of one's
7 supervisor.

8 Defendants next argue that the evidence that might be elicited from these witnesses
9 should be excluded because, "[o]nly the opinions of the decision-makers are relevant."⁴ The
10 cases cited by Defendants in support of this proposition do not establish such a broad rule. For
11 example, in *Schuler v. Chronicle Broadcasting Co., Inc.*, 793 F.2d 1010 C.A.9. (Cal). 1986, the
12 question before the Court was whether the plaintiff's subjective opinions about her own skills
13 was enough to overcome the employer's assertions that she was less competent than competing
14 applicants. This case does not support the defendants' broad attempt to prevent relevant
15 evidence from being admitted in this matter.

16 Ms. Johnson is certainly qualified to discuss her training and experience in working
17 with Fred Meyer. She's also qualified to testify that the work she performed was consistent
18 with that training and experience. Mr. San Miguel can dispute that through his testimony but
19 her testimony, that she acted in accordance with her training and decade of experience at Fred
20 Meyer, is clearly relevant and admissible.

21 Similarly, her co-workers can testify as to their training and experience. They can also
22 testify as to their observations. It does not take a "Manager" to determine whether the
23 objective criteria for completing "recovery" or a "planogram" have been completed. Someone
24 who is trained, experienced and tasked with completing the work can testify as to what they did
25 and what they observed.

26 ⁴ Defendants' Omnibus Motion *in limine* at 2.

1 In *Grimwood vs. University of Puget Sound, Inc.*, 753 P.2d 517 (WA., 1988), the Court
2 found that a plaintiff whose affidavit simply consisted of “conclusions and opinions as to the
3 significance of facts” did not create a genuine issue for trial. Observations by eye witnesses are
4 not conclusions. For example, if one of plaintiff’s witnesses says, “I was at the store the same
5 morning Mr. San Miguel complained about recovery. I observed the recovery. It was done in
6 accordance with the standards and trainings I received. Shirts were sorted by size and properly
7 hung....” This testimony would contradict Mr. San Miguel’s.

8 While Mr. San Miguel and Fred Meyer’s corporate intentions are ultimately at issue
9 here in this wrongful termination case, they must be evaluated in light of the direct and
10 circumstantial evidence available. If employees are taught to do recovery one way and Ms.
11 Johnson is observed to complete her recovery consistent with policy and practice, this evidence
12 must be juxtaposed against Mr. San Miguel’s assertions that the recovery was done improperly.

13 Applicable case-law provides that in the course of wrongful-discharge litigation, a
14 plaintiff may not meet the burden of showing that a defendant employer’s reason for
15 discharging an employee is merely pretextual by offering up, “subjective personal judgments.”⁵
16 The instant case clearly differs in that the testimony of a plaintiff’s co-workers is inherently
17 less subjective than an individual’s perception of her own work. Moreover, in the cited cases
18 there is no indication of voluminous employer-provided standards of performance, which again
19 increase the potential likelihood of objectivity of testimony that may be offered. Most
20 importantly, there are genuine issues of material fact in Ms. Johnson’s case as to how well she
21 was doing her job. While there may certainly be managerial functions which could not be
22 evaluated through the observations of co-employees, when the criticism is based upon
23 “recovery” and “planograms”, activities which all of these same employees are trained and
24 accomplish on a daily basis, their observations are clearly relevant and admissible.

25 ⁵ *Schuler v. Chronicle Broadcasting Co., Inc.*, 793 F.2d 1010, 1011 (9th Cir. 1986) (citing *Smith v. Flax* 618 F.2d
26 1062, 1067 (4th Cir. 1980)).

1 Plaintiff and her co-worker's testimony are not to be offered as subjective personal
2 judgments or perception. Rather, Fred Meyer has comprehensive training manuals outlining
3 objective criteria and standards for recoveries and planograms. As Fred Meyer employees and
4 former employees, with training from Fred Meyer regarding the objective standards and criteria
5 at issue in this case, Plaintiff and her co-workers have extremely relevant testimony regarding
6 Plaintiff's job performance. This testimony is relevant to determine whether, despite numerous
7 volumes of Fred Meyer objective standards and criteria for recoveries and planograms, and
8 despite the fact that Plaintiff performed these duties for over 10 years without any problems,
9 Mr. San Miguel had legitimate cause for criticizing Plaintiff's performance and then
10 threatening her with demotion or discharge if her performance did not improve. Moreover, one
11 of the very issues in this case is whether Mr. San Miguel's subjective personal judgment
12 regarding Plaintiff's performance of recoveries and planograms during the six days after she
13 returned, conformed to Fred Meyer's objective standards and criteria for performing such tasks.

14 Finally, Defendants argue that Plaintiff's and her co-workers' testimony about
15 Plaintiff's work performance should be excluded because it is improper character evidence.
16 Evidence of a plaintiff's character, disposition, or personality may not be introduced to prove
17 that she acted in conformity with any of these personal characteristics.⁶ Because this evidence
18 is not offered to prove Plaintiff's character or for the purpose that Plaintiff acted in conformity
19 therewith, the testimony is not improper character evidence. Instead, the subject evidence is
20 opinion testimony relevant to establish that Plaintiff's termination had nothing to do with her
21 work performance. Plaintiff offers the evidence to assist the court in determining whether Mr.
22 San Miguel had legitimate cause for criticizing Plaintiff's performance and then threatening her
23 with demotion or discharge if her performance did not improve, and whether he acted in
24 accordance with Fred Meyer policies and practices. The fact that Plaintiff offers evidence
25 regarding first-hand observations of Plaintiff's work performance does not convert otherwise
26 relevant testimony into improper character evidence.

26 ⁶ Fed. R. Ev. 404(a).

1 While Defendants would undoubtedly prefer that Mr. San Miguel's subjective
2 judgments and perception of Plaintiff's work performance be the only opinion heard by the
3 jury, such a position is not supported by the Federal Rules of Evidence or applicable case law.

4 **IV. PLAINTIFF'S AND HER CO-WORKERS' TESTIMONY AND/OR**
5 **AFFIDAVITS AND THEIR OPINIONS ARE ADMISSIBLE AS THEY HAVE**
6 **FOUNDATION BASED ON PERSONAL KNOWLEDGE AND AS THEY ARE**
7 **CLEARLY NOT HEARSAY OR QUALIFY AS EXCEPTIONS TO THE**
8 **HEARSAY RULE.**

9 Defendants attempt to exclude testimony of Plaintiff's Fred Meyer co-workers arguing,
10 generally, that this testimony lacks foundation and is hearsay. Evidence may be excluded when
11 it lacks foundation in that the witness does not have personal knowledge of the matter; personal
12 knowledge may be established by the same witness's own testimony.⁷ All of the co-workers
13 expected to testify on Plaintiff's behalf were employees at Fred Meyer when Plaintiff's
14 employment was terminated. Each and every one is familiar with Fred Meyer policies and
15 practices. Each was thoroughly trained by Fred Meyer on the objective standards and criteria
16 for recoveries and planograms. The training and employment experiences of each of these
17 witnesses – in addition to their own statements – clearly establish the foundational basis for
18 their personal knowledge of the matters on which they will be asked to testify.

19 Hearsay is testimony as to an out-of-court statement offered in court for the purpose of
20 proving the truth of the matter asserted.⁸ The testimony of each of Plaintiff's witnesses is here
21 to be offered for the purpose of showing the existence of a comprehensive program of policies
22 and practices by which Plaintiff had the right and reasonable expectation to be measured.
23 While other evidence may be offered to prove that Mr. San Miguel's subjective personal
24 judgment regarding Plaintiff's performance of recoveries and planograms did not conform to
25 Fred Meyer's objective standards and criteria for performing such tasks, that is not the purpose
26 for which Plaintiff seeks to call her co-workers as witnesses. A further purpose in the

27 ⁷ Fed. R. Ev. 602.

28 ⁸ Fed. R. Ev. 801(c).

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PROOF OF SERVICE

STATE OF ALASKA, FIRST JUDICIAL DISTRICT AT JUNEAU

I am employed in the City and Borough of Juneau, State of Alaska... I am over the age of 18 and not a party to the within action. My business address is 424 N. Franklin Street, Juneau, AK 99801.

On September 5, 2006, I served the foregoing document described as , on the interested parties in this action by serving the original true copies, addressed as follows:

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☒ By mail, I deposited such envelope(s) in the mail at Juneau, Alaska, with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Juneau, Alaska, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

☐ By personal service, I delivered such envelope(s) by hand to the ☐ office(s); ☐ the court box of the addressee(s)..

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1 ☐ (State) I declare under penalty of perjury under the laws of the State of Alaska
that the foregoing is true and correct.

2 ☒ (Federal) I declare that I am employed in the office of a member of the Bar of
3 this Court, at whose direction the service was made.

4 Executed on September 5, 2006 at Juneau, Alaska.

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